

STATE OF MICHIGAN  
COURT OF APPEALS

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SHR LIMITED PARTNERSHIP,

Plaintiff/Counter Defendant-  
Appellant,

v

MERCURY EXPLORATION COMPANY,  
DOMINION RESERVES, INC., and  
QUICKSILVER RESOURCES, INC.,

Defendants/Counter Plaintiffs-  
Appellees.

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UNPUBLISHED

April 11, 2006

No. 258058

Otsego Circuit Court

LC No. 99-008060-CK

Before: Kelly, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

In this oil and gas case, which was previously before this Court in Docket Number 232466,<sup>1</sup> plaintiff appeals as of right the trial court's judgment in defendants' favor. We affirm.

I. Facts and Procedural History

Plaintiff and defendants are assignees to separate 1968 oil and gas lease agreements. Plaintiff is entitled to receive royalties from defendants under identical clauses contained in the lease agreements. In 1983, plaintiff's and defendants' predecessors in interest litigated the issue of whether the lease agreements entitled defendants' predecessor in interest to deduct post-production costs from royalty payments. In that case, *North Michigan Land & Oil Corp v Shell Oil Co* and *Nielson v Shell Oil Co*, consolidated Crawford Circuit Court docket numbers 80-004-292-CZ and 80-004-294, the trial court concluded that defendants' predecessors in interest were entitled to deduct post-production costs from royalty payments. Specifically, the trial court

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<sup>1</sup> *SHR Ltd Partnership v Mercury Exploration Co*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2002 (Docket No. 232466).

observed that defendants' predecessors in interest "were and are entitled to apportion the costs of dehydration, treatment, and compression between themselves and leses[ors]."<sup>2</sup>

On March 18, 1999, plaintiffs filed suit in this case alleging a single breach of contract claim against each defendant. Plaintiff argued that defendants breached their lease agreements when they began to deduct post-production costs including the costs "of treatment for CO2 removal, transportation on third party pipelines to the point of sale, severance taxes, 'Fuel Loop' costs, and miscellaneous charges." After the parties filed cross-motions for summary disposition, the trial court concluded that the royalty clause unambiguously subjected "the royalty owner to deduction of post-production costs necessary to render the raw product marketable and saleable as gas." Plaintiff appealed this order. A majority panel<sup>3</sup> of this Court concluded as follows:

[T]he court reached the correct result albeit for the wrong reasons.

As the trial court acknowledged, this case was previously litigated and resulted in an order that, though appealed, was never overturned. Under these circumstances, it is abundantly clear that we must address the res judicata doctrine. The purposes of res judicata are to relieve parties of the cost and inconvenience of multiple lawsuits, to conserve judicial resources, and to preserve the precedence of previous adjudications. Applying the elements of res judicata to this case, first, the previous action was decided on the merits, and a final decision was reached. The fact that the previous litigation ultimately settled after the trial court's final order was issued does not preclude the order's res judicata effect. Second, the previous action involved the predecessors in interest of the parties to the instant litigation. Thus, the predecessors are privies of the instant parties and the instant parties are bound by their predecessors' actions.

Third, the over-arching issue in this case – namely, whether post-production costs were deductible from royalties under the terms of the lease agreement – was resolved in the previous litigation. Accordingly, all the elements of res judicata are met. Therefore, the trial court should have concluded that summary disposition was appropriate under MCR 2.116(C)(7) because the parties had previously litigated this matter in *North Michigan*. Though the trial court gave a different explanation for its decision, our conclusion merely provides an alternative ground for affirming.

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<sup>2</sup> Plaintiff's predecessors in interest appealed the decision in a consolidated appeal. However, before this Court issued an opinion, the parties agreed to settlements prohibiting defendant from making post production deductions.

<sup>3</sup> Judge Whitbeck, concurred in part and dissented in part.

Finally, we note that an important aspect of this case is that the lease was drafted in 1968. Currently, oil and gas producers and lessors use “division orders” to indicate who receives royalties and in what amount. . . .

The record in this case does not indicate whether the parties proposed or signed a division order. Thus, we remand this case for a determination of whether the parties proposed or signed a division order governing the disputed issues. If the parties did sign a division order, they are bound by its terms under ordinary contract principles.

At oral argument in this case, plaintiff asserted that the original trial court’s decision did not address all post-production costs the present defendants seek to deduct from plaintiff’s royalties. In *North Michigan, supra*, slip op 5-10, 15, 26-27, the court only held that the parties must “apportion the costs of dehydration, treatment, . . . compression,” and marketing costs between them. The disputed post-production costs raised in the court below and argued on appeal are: treatment for carbon dioxide removal; transportation to the point of sale; severance taxes; fuel loop costs; “miscellaneous charges”; privilege fees; saltwater disposal and related operations; and costs incurred in gathering, separating, dehydrating, and compressing gas. The trial court in the present case ruled on the following types of costs: “post-production costs necessary to render the raw product marketable and saleable as gas,” including severance taxes and privilege fees; and costs incurred in saltwater disposal and gathering, separating, dehydrating, and compressing gas.

To the extent that the lower court did not address all issues that the parties properly raised below, and with regard to issues left unresolved by the trial court’s decision in *North Michigan, supra*, we remand for a determination of these issues. We note that any issues that could have been raised but were not raised in the 1983 action are barred under the doctrine of res judicata. [*SHR Ltd Partnership v Mercury Exploration Co*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2002 (Docket No. 232466), slip op pp 2-3 (2003) (citations omitted).]

On remand, plaintiff filed a request for status conference with the circuit court “to establish time frames and further proceedings consistent with the Court of Appeals’ Order.” After holding a status conference, the trial court issued a judgment in defendants’ favor, concluding in relevant part as follows:

The Parties did not sign a division order governing the disputed issue.

Judge Porter’s December 8, 1983 Opinion [*North Michigan*] is a res judicata bar to all of Plaintiff’s claims before this Court on remand. It is this Court’s interpretation that Judge Porter’s Opinion cited specific post-production costs only as examples of post production, used by him for purposes of explaining his opinion. It is this Court’s interpretation that Judge Porter ruled, as a matter of law, that the gas royalty clause of the leases entitles the lessee to apportion all

post production costs between lessor and lessee, in connection with computing royalties. It is this Court's interpretation that Judge Porter's Opinion is to the effect that post-production costs must be expected to vary in type and amount over time.

All of Plaintiff's claims regarding post-production costs are barred by res judicata. [*North Michigan*] . . . decided the issues of deductibility of all post-production costs based on the leases, and is binding on the parties before this Court . . . .

This Final Judgment on Remanded Issues is entered in favor of Defendants. All of Plaintiff's post-production costs claims are dismissed on the basis of res judicata.

## II. Analysis

Plaintiff first contends that the trial court erred by failing to comply with the law of the case and follow this Court's instructions on remand. We disagree. Whether a trial court erred by failing to follow an appellate ruling on remand is a question of law reviewed de novo by this Court. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 133-134; 458 NW2d 475 (1998). "The law of the case doctrine provides that if an appellate court has decided a legal issue and remanded the case for further proceedings, the legal issue determined by the appellate court will not be differently decided on a subsequent appeal in the same case where the facts remain materially the same." *Grace v Grace*, 253 Mich App 357, 362-363; 655 NW2d 595 (2002). "Therefore, generally, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Id.* at 363. "The law of the case doctrine applies only to questions actually decided in the prior decision and to those questions necessary to the court's prior determination." *Kalamazoo, supra* at 135. "The rule applies without regard to the correctness of the prior determination." *Id.*

The trial court did not fail to follow this Court's instructions on remand. To begin with, as instructed, the trial court determined that the parties did not sign a division order governing the disputed issues. Further, this Court did not instruct the trial court to rule on specific deductions for post-production costs. Rather, this Court noted that plaintiff asserted, at oral argument on appeal, that the trial court had failed to address all of these deductions. However, this Court's remand directed the trial court to consider only those matters that were "properly raised below." Plaintiff alleged in its first amended complaint that the post-production costs not reasonably necessary were being deducted and the post-production costs in excess of the actual costs were being deducted. However, this complaint was withdrawn long ago. All that remained before the court was plaintiff's March 1999 complaint, which asked for an interpretation of the lease agreement and argued that no post-production costs could be deducted. Because challenges to specific post-production costs were not properly raised below, the trial court correctly concluded, on remand, that there was not anything left to do. On remand the trial court also recognized that the question of whether particular post-production costs were necessary to market gas presented a different kind of litigation and a question that was not before it on remand and not before the trial court in *North Michigan*. The trial court and this Court decided that post-production costs could be deducted as a matter of law. On remand, the trial court

correctly concluded that the legal issues of contract interpretation before it had been fully addressed.

The trial court also properly concluded that, for the purposes of res judicata, no issues were left unresolved by the contract interpretation in *North Michigan*. *North Michigan* did not address the legitimacy of any specific-post-production costs and only referenced specific costs because the parties stipulated that the burden of specific costs before the court could have been placed on the gas purchaser, thus reducing the sale price of the gas. *North Michigan* based its decision on principals of contract interpretation. The court concluded that gas “produced” does mean that the gas has been dehydrated, treated, compressed, transported, or improved gas, or anything other than gas in its natural state at the wellhead. Thus, *North Michigan* concluded that the lease called for valuation of the gas prior to enhancement, and thus the post-production costs must be apportioned between the lessor and the royalty owner. *North Michigan* only discussed specific post-production costs to set up a distinction between the value of gas in its raw condition and the value of the gas in its enhanced condition. Therefore, we conclude that the trial did not fail to comply with the law of the case and follow the instructions of this Court on remand.

Plaintiff also contends that the trial court erred by dismissing plaintiff’s claims at a status conference when there was not a motion before it and the parties were not permitted to brief the issues on which the court based its decision. We disagree. Generally, issues involving constitutional due process are reviewed de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *In re Brock*, 442 Mich 101, 110-111; 499 NW2d 752 (1993), quoting *Mathews v Eldridge*, 424 US 319, 332, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976) (internal quotations omitted). “Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker.” *Reed*, *supra* at 159. Due process is a flexible concept, the essence of which is to ensure fundamental fairness. *Id.*

In this case, the proceedings gave plaintiff a meaningful opportunity to be heard. Plaintiff filed a request for status conference “to establish time frames and further proceedings consistent with the Court of Appeals’ Order.” Plaintiff filed a pre-conference memorandum stipulating that division orders had not been executed between the parties. Plaintiff also argued that this Court had determined that the lease did not unambiguously entitle defendants to deduct post-production costs. Plaintiff asserted that discovery was necessary to determine the current post-production cost deductions and whether those deductions were the same as those allowed in *North Michigan*, whether the costs deducted by defendants could have been raised in the 1983 litigation, whether the lease authorizes specific deductions, and the amount of any unauthorized deductions. The trial court held a status conference during which it heard argument from both parties and dismissed the case, concluding that no issues remained before the court. Under these circumstances, we conclude that plaintiff had a meaningful opportunity to apprise the trial court of its position.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Kathleen Jansen  
/s/ Michael J. Talbot